In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 7012

LAKE UNION DRY DOCK & MACHINE WORKS,
Claimant and Appellant,

vs.

WILMINGTON BOAT WORKS, INC., a corporation,
Libelant and Appellee,

THE BOAT "LUDDCO 41," her engines, tackle, apparel, furniture, etc.,
Respondent.

Petition for Rehearing

By LAKE UNION DRY DOCK & MACHINE WORKS,
Claimant and Appellant.

On opinion of the United States Circuit Court of Appeals for the Ninth Circuit, filed in the above matter on September 16, 1933.

WRIGHT, JONES & BRONSON,
Proctors for Claimant and Appellant.

610 Colman Building,
Seattle, Washington.

MARTIN & DICKSON, PRINTERS

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The Lake Union Dry Dock & Machine Works, the claimant and appellant, your petitioner, respectfully submits that it has been aggrieved by the opinion of the above entitled court, rendered herein on the 16th day of September, 1933, in respects hereinafter set forth, and prays for a rehearing of said matter.

Were the facts of this case all as indicated in the opinion, appellant would not feel justified in submitting this petition solely upon questions of law which have been decided contrary to its belief and contentions. Often-times important, in fact controlling, factors are not clearly enough presented by counsel in brief and argument, to make themselves manifest or retained in mind by the Court, and we respectfully submit that this appears to have been the case in the instant appeal, and it is respectfully submitted that in the opinion of counsel, errors of fact stated by the Court in its opinion, are manifest and substantial, and sufficient to account for an affirmance of the lower court, where a reversal should result.

The first error of fact wherein petitioner feels that it has been prejudiced substantially, is that found at the bottom of page 1 of the decision, reading as follows:

> "Appellant having been informed by Sales Corporation that it had undertaken these alterations, at its own expense, made no objection."

The evidence in the case is, without conflict, that the appellant had no knowledge that any of the alterations and work in question upon the boat, was in contemplation or had been undertaken through any out-

side repair yard, until after the work had been completed.

H. B. Jones, secretary of the appellant, testified as follows, in his deposition:

"Q. Do you know whether or not the Lake Union Dry Dock & Machine Works, or yourself, personally, received any knowledge that any work was to be done on these vessels by the Wilmington Boat Works at any time prior to the time that the work had been completed?

A. No; neither the Lake Union Dry Dock & Machine Works nor myself received any such knowledge prior to the time the work was done." (Ap. p. 66; see also claimant's Exhibits 3, 4, 5 and 6.)

Exhibit 6 is not dated, but it will be recalled that it was identified by the same witness, as follows:

"A. And another letter, which is not dated, but which was written, I would say, some time in October, 1930, or subsequently thereto. At any rate, it was a substantial time subsequent to the performance of the work involved in this case." (Ap. p. 68.)

This witness further testified:

"Q. Was it before or after the receipt of that letter that you first discovered that the work had been done by any concern other than the Yacht & Motor Sales Corporation?

A. It was after the receipt of this letter, and I think not until some time in November, 1930, that we found that there was any claim against

> the boat, or by any outside party on account of this work." (Last letter referred to is claimant's Exhibit 7.) (Ap. p. 69.)

It is submitted, therefore, that since the broker, Yacht & Motor Sales Corporation, had agreed to service and repair this boat itself, and at its own expense, it in no wise supports appellee's claim of lien by principles of estoppel, or otherwise, that the appellant made no protest, since it was not given any knowledge of the fact that any third party was involved, until after the appellee went into bankruptcy. A protest after the damage had been done, would have been useless, since claim by the appellee had already been made, and matured, such as it was.

In this connection, it will be remembered that these alterations had been completed by the appellee on September 27, 1930, (see Article III of the libel, Ap. p. 3), and that the broker, Yacht and Motor Sales Corporation, was in the hands of a receiver four days thereafter, on the first day of November, 1930, Mr. Harry C. Wilson, secretary-treasurer of the broker company, having testified on this point as follows:

> "Q. Do you remember about what time you went into receivership?
>
> A. The first of November. I don't know exactly as to the date when the bill came in. As a mat-

ter of fact, I did not see it, it went to the bookkeeper first.

Q. And the company was then in the hands of a receiver, was it?

A. The company was in the hands of a receiver before I ever saw the bill." (Ap. p. 100.)

The second and last error of fact to which we wish to call the Court's attention, and which we believe has a decisive effect upon the conclusion which this Court reached, in distinguishing the broker in this case in principle, from a contractor, under discussion in the case of *The Juanita,* 27 Fed. 438 (D. C. MD. 1922), and also as serving to distinguish this case from *The South Coast,* 251 U. S. 519, and *The Golden Gate,* 52 Fed. (2d) 379, is as follows:

Not only was the agreement between the appellant and the broker in this case that the broker should service and upkeep the vessel at its own expense, but the agreement was further that the broker should do so *by its own employees and at its own plant* and it had no authority, express or implied, to do otherwise.

There is no dispute in the evidence on either the point of where and by whom the service and upkeep of the vessel was to be done, who was to pay for the same, or the entire lack of authority in the broker to

contract for either supplies or repairs, outside of its own plant. The evidence is as follows:

By the witness H. B. Jones:

"Q. Was a definite understanding had about these maintenance charges; were they definitely discussed?

A. Either Mr. Wilson or Mr. Proctor—I think it was Mr. Wilson—stated definitely that they would keep up the boats in good shape by way of painting and varnishing them, and maintaining them in good shape, at their own expense.

Q. Do you know whether or not they had a plant or equipment down there which would enable them to do that right at their own place?

A. *They did have, and told us that they had their own men employed who would do that work.*

Q. And you contemplated that that would be done?

A. That was our understanding, that that would be done *by them at their own expense.*

Q. Was any authority ever given to the Yacht & Motor Sales Corporation by the Lake Union Dry Dock & Machine Works, so far as your knowledge goes, by which they were authorized to have any outside work done on these vessels by outside parties, or to incur any liens or lienable charges against them?

A. There never was any such authority given, and there never was any occasion for giving it, because there was never notice or intimation to the Lake Union Dry Dock & Machine

> Works, or to me, that there was any necessity for doing any such work, outside the work that they would do to keep the boats painted and conditioned, *through their own employees, and at their own plant.*" (Ap. p. 64, 65.)

This testimony is substantiated by that of J. L. McLean, president of the appellant, (Ap. p. 75, 76 and 77), and by Otis Cutting, vice-President and Treasurer of Appellant, (Ap. p. 72, and 73), and verified also by Mr. Wilson of the broker corporation, viz:

> "Q. Did you have any authorization *to order* any work for the Lake Union Dry Dock, for its account?
>
> A. No." (Ap. p. 88.)

It is therefore respectfully submitted that the distinction which the court asserts as existing between a contractor, and the broker in this case, is erroneous, by reason of the court's omission of the primary fact that the broker, like the contractor, was under agreement to furnish supplies and repairs not only at its own expense, but also by its own employees, and at its own plant.

The contractor, like the broker, must of necessity originally procure its supplies and materials which go into a vessel's structure, from other parties, but we

believe the controlling principle in both cases is that the contractor and the broker are both required, understood and expected to themselves supply material and supplies and furnish workmen, to the exclusion of third parties, and that hence, by principle, the broker consignee in this case was actually no more within the statute than a contractor.

We also respectfully submit that this case on the same principle should be distinguished from the case of *The South Coast,* supra, and *The Golden Gate,* supra, being cases where the charterer of a vessel, in the commercial operation of the same, in the business for which it was intended, of necessity did and must contract with third parties for fuel, supplies, etc., merely agreed to clear the vessel of liens so necessarily incurred.

In this case there was certainly the equal of an express prohibition against the creation of a lien, for there was the express agreement that the vessel would not be placed in the hands or subjected to the services of any third parties, and where this court states on page 4 of its opinion, viz:

> "Any inquiry that libelant might have made, would therefore at best have advised it only that authority to create the lien was neither expressly given nor expressly withheld,"

is erroneous, and that actually any inquiry that libelant might have made, would result in information of the true facts, namely, that the broker had agreed to service and upkeep the vessel at its own expense, at its own plant, and by its own employees, and that it had no authority "to order" any repairs or services to be undertaken by any third parties.

WHEREFORE, petitioner and appellant, Lake Union Dry Dock & Machine Works, feeling itself aggrieved by reason of the opinion and decision of this court, prays the indulgence of said Court that a rehearing be granted, and that the mandate of this court may be stayed pending the disposition of this petition.

Respectfully submitted,
LAKE UNION DRY DOCK & MACHINE WORKS,
Appellant and Petitioner,

By R. G. WRIGHT,
H. B. JONES,
ROBERT E. BRONSON,
WRIGHT, JONES & BRONSON,
Its proctors.

CERTIFICATE OF COUNSEL

I, Robert E. Bronson, an attorney regularly admitted to practice in the United States Circuit Court of Appeals, for the Ninth Circuit, do hereby certify that in my opinion the foregoing petition for rehearing in the above entitled case is not presented for the purpose of creating delay, but is well founded, meritorious, and should be granted.

DATED this 24th day of October, 1933.

ROBERT E. BRONSON.